

Letter of Findings Number: 04-20100741
Sales/Use Tax
For Tax Years 2007 - 2009

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ISSUES

I. Sales/Use Tax—Public Transportation.

Authority: IC § 6-8.1-5-1(c); IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-5-27; Sales Tax Information Bulletin 12 (December 2002); Sales Tax Information Bulletin 12 (September 2009); Sales Tax Information Bulletin 12 (December 2009).

Taxpayer protests the assessment of tax relating to equipment used for public transportation.

II. Sales/Use Tax—Diesel Fuel.

Authority: IC § 6-8.1-5-1(c); IC § 6-2.5-4-9.

Taxpayer also protests tax relating to off road diesel fuel.

STATEMENT OF FACTS

The Audit Report states that Taxpayer "is predominately an excavating contractor who specializes in commercial, residential and governmental site work." Taxpayer was audited by the Indiana Department of Revenue ("Department"). Following the audit, Taxpayer filed a protest. A hearing was held, and this Letter of Findings results. Further facts will be supplied as required below.

I. Sales/Use Tax—Public Transportation.

DISCUSSION

The Department initially notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c). Regarding sales and use tax, Indiana imposes a sales tax on retail transactions and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-2-1; IC § 6-2.5-3-2.

The statute dealing with the public transportation exemption is IC § 6-2.5-5-27, which states:

Transactions involving tangible personal property and services are exempt from the state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property.

Turning to the Audit Report, it states (in part):

The taxpayer has [two] semi tractors that are being used to transport raw materials to a local foundry using the foundry's trailers. The taxpayer provides the semi tractors and the drivers and charges a mileage rate to the customer.

The Audit Report goes on to cite to Sales Tax Information Bulletin 12, and from the Audit Report it appears that Taxpayer was assessed under the premise that Taxpayer did not meet some of the requirements of Sales Tax Information Bulletin 12 (July 2010), 20100623 Ind. Reg. 045100390NRA. However, that version of the Information Bulletin was not in effect during the audit period. The Sales Tax Information Bulletin 12 versions before that were the 2002 version (Sales Tax Information Bulletin 12 (December 2002), 26 Ind. Reg. 913) and two versions in 2009 (Sales Tax Information Bulletin 12 (September 2009), 20091028 Ind. Reg. 045090847NRA, and Sales Tax Information Bulletin 12 (December 2009), 20100127 Ind. Reg. 045100028NRA). And during that interval of time (i.e., between 2002 and 2009), the Indiana Tax Court issued a public transportation opinion—*Carnahan Grain, Inc. v. Indiana Dept. of Revenue*, 828 N.E.2d 465 (Ind. Tax Ct. 2005). In *Carnahan* the Indiana Tax Court held that:

Accordingly, because *Carnahan* predominantly used the property at issue for transporting agricultural commodities owned by third parties, it is entitled to the public transportation exemption.

Id. at 469. The Indiana Tax Court, in a footnote, also stated: "the Court holds that the relevant inquiry is the use of the property at issue rather than the nature of the taxpayer's business...." *Id.* at 469 n.6.

In its protest letter, Taxpayer states "[t]he trucks were used 100[percent] for public transportation through the lease arrangement. The Trucks were not used in the demolition and excavation business." Further, Taxpayer states:

[Taxpayer] did not use the Trucks for any of its other work. It kept them separate for public transportation use. It kept accurate records of the fuel and parts used for the Trucks. Therefore, any fuel and repair items related to the Trucks are exempt from sales tax.

Taxpayer provided a copy of two operating contracts. The contracts state in part that, "During the term of this Agreement, Contractor [i.e. Taxpayer] shall provide Carrier transportation related services and the use of the Equipment..." and further in the agreement it states that "Contractor [i.e., Taxpayer] shall operate the equipment

covered by the terms of this Agreement himself or shall furnish sufficient employees to operate said equipment."

Based upon Taxpayer's arguments and documentation provided, Taxpayer has met its burden of proof as it relates to public transportation, as required by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is sustained.

II. Sales/Use Tax—Diesel Fuel.

DISCUSSION

Taxpayer at the hearing raised an issue not protested in its protest letter. Taxpayer argued that there was an issue involving off road diesel fuel. The diesel fuel was apparently used for equipment on an exempt job. IC § 6-2.5-4-9 states:

(a) A person is a retail merchant making a retail transaction when the person sells tangible personal property which:

(1) is to be added to a structure or facility by the purchaser; and

(2) after its addition to the structure or facility, would become a part of the real estate on which the structure or facility is located.

(b) Notwithstanding subsection (a), a transaction described in subsection (a) is not a retail transaction, if the ultimate purchaser or recipient of the property to be added to the structure or facility would be exempt from the state gross retail and use taxes if that purchaser or recipient had directly purchased the property from the supplier for addition to the structure or facility.

The Department notes that IC § 6-2.5-4-9(b) requires "the property to be added to the structure or facility...." Any fuel that may have been used by Taxpayer would not have added to the structure or facility, it would have been used in the equipment. On this issue, Taxpayer has not met its burden of proof under IC § 6-8.1-5-1(c).

Also, at the hearing Taxpayer withdrew the protest relating to equipment purchased at auctions and then resold (in fact, in its protest letter Taxpayer states: "Taxpayer admits that it is not in the 'business of reselling equipment' so agrees that sales tax could be due on those purchases."). Since this issue was withdrawn, it is not addressed in this Letter of Findings.

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

Taxpayer's protest is sustained regarding its protest as it relates to public transportation; Taxpayer's protest regarding off road diesel fuel is denied. Taxpayer also withdrew its protest of equipment that it purchased and then resold.

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